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The Common Market for Eastern and Southern Africa (COMESA) and the COMESA Court: Immunity of an international organisation from legal action

This paper examines the legal aspects of immunity of international organisations from legal action and proceedings, drawing upon lessons from the Common Market for Eastern and Southern Africa (COMESA), including experiences of some other international organisations. The issues dealt with extend to pertinent aspects of international economic law that border between labour law, on the one hand, and public international law, on the other. The paper provides intellectual perspectives that are of wider implication to many international organisations and regional integration groups. Underscoring views in this paper is the thesis that international financial institutions, as public bodies pursuing international public purposes (*e.g.* facilitating reconstructions and development in less developed countries, promoting international investment and trade, thus raising living standards and reducing poverty on a world-wide scale), should be permitted to enjoy immunity from legal action before national and regional courts except where such immunity is explicitly waived. This claim for immunity is based primarily on customary international law which accords immunity to all public international organisations, at least for their non-commercial activities.² But before examining the issue of immunity of international organisations from legal action, we will first provide some background insights into the structure and organisation of COMESA.

1.1 Background to the setting up of COMESA and objectives of COMESA

COMESA was established on November 5, 1993 by a treaty entered into in Kampala, Uganda.³ The COMESA Treaty provided that States that were eligible to join COMESA membership included Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Sudan, Swaziland, Tanzania, Uganda, Zambia, Djibouti, Angola, Burundi,

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² See below for a fuller discussion and for instructive authorities.

³ See International Legal Materials, Vol. XXXIII, No. 5, September 1994, p. 1067.

Comoros, Seychelles, Somali and Zimbabwe.⁴ It is further provided in the preamble to the treaty that:

“The following States of Eastern and Southern Africa may become Member States of the Common Market upon fulfilling such conditions as may be determined by the Authority:

The Republic of Botswana; and
The Republic of South Africa (Post-Apartheid).”⁵

In Eastern and Southern Africa, the establishment of COMESA, as a regional integration body, was preceded by the transformation of the Preferential Trade Area (PTA) into COMESA. PTA, as a regional integration scheme, had among its objectives the following:

- (i) to create trade within the Southern and Eastern Africa region (i.e. between Member States) and;
- (ii) to divert trade away from the then apartheid South Africa.

Providing a legal forum for the establishment of COMESA, Article 2 of the COMESA Treaty provides as follows:

“*Conscious* of the overriding need to establish a Common Market for Eastern and Southern Africa: *Bearing in mind* the establishment among their respective States of the Preferential Trade Area for Eastern and Southern African States as a first step towards the creation of a Common Market and eventually of an Economic Community for Eastern and Southern Africa;

Recalling the provisions of Article 29 of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States to the effect that steps should be taken to develop the Preferential Trade Area established by that Treaty into a Common Market and eventually into an Economic Community...

Determined to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development...

Having regard to the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law; and...”

From the above paragraph, it is clear that COMESA is a follow up to PTA. What has happened is that PTA has now been transformed into COMESA. Thus, the process of economic integration under this regional integration scheme has now progressed from a preferential trade area to a common market. Here, the integration scheme is designed to have three phases. The first phase relates to the establishment of a preferential trade area. This is followed by the conversion of this trade area into a common market. Finally, the common market will then be converted into an economic community.

⁴ Preamble of the treaty establishing COMESA in *Ibid.*, p.1073.

⁵ Section 3 of the preamble of the COMESA Treaty.

Although the COMESA Treaty provides that the regional integration scheme under that treaty is divided in three phases, the COMESA Treaty does not distinguish a ‘preferential trade area’ from a ‘common market’, or a ‘preferential trade area’ from an ‘economic community’. Neither does the treaty distinguish a ‘common market’ from an ‘economic community’. Article 2 of the COMESA Treaty merely provides that ‘Preferential Trade Area’ means the Preferential Trade Area for Eastern and Southern Africa established by Article 1 of the Treaty for the establishment of the PTA. This provision in the COMESA Treaty goes on to provide that a Common Market means the Common Market for Eastern and Southern Africa established by Article 1 of the COMESA Treaty itself. Even so, the provisions referred to in Article 2 of the COMESA Treaty do not provide definitions of what constitutes a preferential trade area, a common market or an economic community. Thus, the COMESA treaty does not draw a clear distinction regarding the three phases of the COMESA regional integration scheme. What is clear, however, is that, on paper, the scheme is considered to have progressed from a preferential trade area into a common market.⁶ As pointed out above, PTA has been abolished and COMESA has been set up in its place. The third phase of the regional integration scheme is thus seen to be the time at which COMESA will be transformed into an economic community.

1.2 Aims and objectives of COMESA

Article 3 of the COMESA Treaty sets out the following aims and objectives of COMESA:

“The aims and objectives of the Common Market shall be:

- (a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structure;
- (b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;
- (c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;
- (d) to co-operate in the promotion of peace, security and stability among Member States in order to enhance economic development in the region;
- (e) to co-operate in strengthening the relations between the Common Market and the rest of the World and the adoption of common positions in international fora; and
- (f) to contribute towards the establishment, progress, and the realisation of the objectives of the African Economic Community⁷.”

⁶ See above.

⁷ In Article 2 of the COMESA Treaty it is provided, inter alia, that the COMESA Treaty was inspired by the treaty for the establishment of the African Economic Community: “Inspired by the objectives of the Treaty for the

We now turn to provide an outline of the main organs of COMESA

1.3 Organs of COMESA:

Article 7 of the COMESA Treaty lists the following bodies as the principal organs of COMESA:

- (a) the COMESA Authority;
- (b) the COMESA Council;
- (c) the COMESA Court of Justice;
- (d) the COMESA Committee of Governors of Central Banks;
- (e) COMESA Intergovernmental Committees;
- (f) COMESA Technical Committees;
- (g) the COMESA Secretariat; and,
- (h) the COMESA Consultative Committee.

The COMESA Authority and the COMESA Council are concerned, respectively, with matters of policy formulation and policy recommendation. The Authority, consisting of Heads of State or Government of the Member States, is the supreme policy organ of COMESA and is responsible for general policy, and the direction and control of the performance of the executive functions of COMESA.⁸ Furthermore, the Authority is responsible for the achievement of COMESA's aims and objectives.⁹ And decisions of the Authority are binding on all Member States and on all other organs of COMESA other than the COMESA Court in the exercise of its jurisdiction.¹⁰ Decisions of the COMESA Authority are taken by consensus,¹¹ and the Authority has powers to determine its own rules of procedure.¹²

The Council of Ministers, on the other hand, consists of such Ministers as may be designated by each COMESA Member State.¹³ The Council is responsible for monitoring and keeping under constant review and ensuring the proper functioning and development of the Common Market.¹⁴ It makes recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Common Market.¹⁵ The Council also gives directions to all other subordinate organs of COMESA other than the COMESA Court in the exercise of its jurisdiction.¹⁶

Establishment of the African Economic Community and in compliance with the provisions of Article 28(1) of the said Treaty.”

⁸ Treaty for the establishment of COMESA, Article 8(1).

⁹ *Ibid.*, Article 8(1).

¹⁰ *Ibid.*, Article 8(3).

¹¹ *Ibid.*, Article 8(7).

¹² Article 8(6).

¹³ Article 9(1).

¹⁴ Article 9(2)(a).

¹⁵ Article 9(2)(b).

¹⁶ Article 9(2)(c).

With regard to powers of the COMESA Court, the Council may request the Court to give advisory opinions on matters affecting the Council.¹⁷ Apart from the functions outlined above, other important responsibilities of the COMESA Council include making recommendations to the COMESA Authority on the designation of Least Developed Countries¹⁸ and designating economically depressed areas of the Common Market.¹⁹ Like decisions of the Authority, decisions of the Council are binding on all Member States and all subordinate organs of COMESA other than the COMESA Court in the exercise of its jurisdiction.²⁰ It must also be observed that, as with the case of the COMESA Authority, decisions of the COMESA Council are taken by consensus.²¹ Furthermore, subject to any directions that the COMESA Authority may give, the COMESA Council has power to determine its own rules of procedure.²²

Whereas the COMESA Committee of Governors of central banks is responsible for the development of programmes and action plans in the field of finance and monetary co-operation,²³ the COMESA Intergovernmental Committee is responsible for the development of programmes and action plans in all sectors of co-operation except in the finance and monetary sectors.²⁴ COMESA also has a Secretariat headed by a secretary-general.²⁵ The secretary-general is appointed by the COMESA Authority and is the chief executive officer of COMESA.²⁶

Chapter Five of the COMESA Treaty establishes the COMESA Court of Justice. The court plays the traditional role of a judiciary and adjudicates over claims by COMESA employees and third-parties against COMESA.²⁷ Decisions of the COMESA Court on the interpretation of provisions of the COMESA Treaty take precedence over decisions of any national court.²⁸

Following below is an examination of one of the first cases to come up before the COMESA Court, and dealing precisely with the issue of immunity of an international organisation from legal action. The case of *Eastern and Southern African Trade and Development Bank (PTA Bank) and Dr Michael Gondwe v. Martin Ogang* came up before the COMESA Court in 2000, and judgement was delivered on March 29, 2001.²⁹

¹⁷ Article 9(2)(e).

¹⁸ Article 9(2)(i).

¹⁹ Article 9(2)(j).

²⁰ Article 9(3).

²¹ Article 9(6).

²² Article 9(5).

²³ Article 13(2).

²⁴ Article 14(1)(2).

²⁵ Article 17.

²⁶ Article 17(2).

²⁷ Article 27.

²⁸ Article 29(2).

²⁹ See full text of the judgment Online at Lawafrica.com, available at: <<<http://www.lawafrica.com/services/go1.asp?file=../comesa.xml>>>, visited on December 21, 2005.

1.4 Brief facts of the case and major issues before the court

The *PTA Bank v. Martin Ogang* case involved a dispute in which the respondent, Martin Ogang, alleged that he had been unlawfully dismissed by the Board of the PTA Bank. In the court's first hearing, the respondent was granted a Suspension Order to stop PTA Bank from enforcing its decision to terminate Martin Ogang's employment contract. On second instant, the issues before the court included the following:

- (a) to determine whether or not the PTA Bank, an international financial institution, was immune from jurisdiction of the COMESA Court; and
- (b) to resolve the claim made by the PTA Bank and Dr. Michael Gondwe, the applicants, that since the respondent, Mr Ogang, did not state the law upon which the PTA Bank could be made to stand before the COMESA Court, the respondent had no *locus standi*.

The COMESA Court dismissed the PTA Bank's argument that, by its Charter, concluded on 12th July 1985, PTA Bank had certain privileges and immunities in territories of PTA Member States from legal proceedings. The COMESA Court ruled that the PTA Bank's immunity applied only to actions brought about by members of the PTA Bank, and that these members were states and financial institutions. The PTA Bank does not have members who are individuals. The court ruled, thus, that the immunities provided in the Charter did not apply to actions brought about by individuals. The court cited Article 42 of the PTA Bank Charter which reads, in part, as follows:

*"1. Actions may be brought against the Bank in the territories of the Member States or elsewhere in a Court of competent jurisdiction.
2. No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank."*

However, in making its claim, the PTA Bank placed greater emphasis on a provision in Article 48 of the PTA Bank Charter, which reads in part:

"Subject to paragraphs 3 and 4 below, the Bank shall enjoy immunity from every form of legal process except in cases arising out of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of the member State in which the Bank has its principal office, or in the territory of a Member State or non-Member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities."

Closely related to the *PTA Bank v. Martin Ogang* case is a Kenyan case involving, once again, the PTA Bank.³⁰ Muthoga passionately writes that, in their concurring judgments, three learned Justices of the Court of Appeal of Kenya delivered separate opinions, all to the effect that the appeal had to be allowed because the respondent was not entitled to enjoy immunity from suit and legal process.³¹ Although the reasoning of the three justices was somewhat different, they all arrived at the same ruling. Commenting on the judgment of the presiding judge in the Kenyan case, Justice R. O. Kwach, Muthoga argues that the judgement makes some assertions which are demonstrably incorrect. The judge found as a fact that pursuant to Section 9 of the Privileges and Immunities Act (Chapter 179), the Minister had regularly and by a Legal Notice Number 265 20th May, 1991, declared the PTA Bank an 'international organisation' which by virtue of that statutory provision was entitled to enjoy certain privileges, including 'immunity from suit or legal process.'³² There was a question, however, argued before the Justices of Appeal, to the effect that the Minister acted illegally and in excess of his powers by declaring PTA Bank an 'international organization.'³³ According to Muthoga, the Minister could have been acting in discharge of Treaty obligations which Kenya had assumed when it signed the Treaty For the Establishment of the Preferential Trade Area for Eastern and Southern African states (The PTA Treaty) and later the Treaty Establishing the Common Market for Eastern and Southern Africa (the COMESA Treaty).³⁴ These treaties required the signatories thereof to provide the PTA Bank with immunity from suits and legal process within their territories. Therefore, Minister could have been acting properly and in line with actions taken by other ministers from the thirteen (13) other countries that were signatories to the Treaty and members of the PTA Bank. Whether or not Kenya should have signed the Treaty, or being a member of the PTA Bank, should have given effect to Article 43 of the Charter of the Bank are matters which it was not open to the Kenyan court to pronounce upon. That, however, did not stop the judge from declaring that granting the PTA Bank immunity from suit and legal process 'across the board to cover even purely commercial transactions pertaining to its activities as a Bank' would not only be against public policy but also breach of international law.³⁵ Muthoga asserts that, firstly, the issue of whether or not immunity should have been given was not argued before the Kenyan Court of Appeal.³⁶ What was argued instead was whether or not immunity had been granted. Having found that immunity had been granted (rightly or wrongly), His Lordship was precluded from saying that immunity did not exist.³⁷ The relationship between the parties was clearly that the PTA Bank could not be sued in any Kenyan court of law. Recourse against it had to be by way of arbitration, as provided for in the Loan and Facility Agreement.³⁸

³⁰ L.G. Muthoga, "Law in the Making," *The Lawyer Magazine*, No.14 (October 1999), as reproduced on the web-site of Lawafrica.com at:

<<<http://www.lawafrica.com/Magazine/MagViewer.asp?ID=105&HighLightStr=PTA%20Bank&HighLightField=Content>>>, visited on December 2005.

³¹ See *Ibid.*

³² See *Ibid.*

³³ See *Ibid.*

³⁴ See *Ibid.*

³⁵ See *Ibid.*

³⁶ See *Ibid.*

³⁷ See *Ibid.*

³⁸ See *Ibid.*

Whether or not Muthoga's criticisms here provide a well-grounded jurisprudential argument is a different issue altogether. What is important is to demonstrate the intensity of the legal debate that has surrounded the granting of immunity to international bodies such as the PTA Bank. Muthoga goes on to say:

“His Lordship refers to the grant of immunity being against public policy and in breach of International Law. By whom is this public policy to be ascertained if it is not Parliament. What International Customary Law is he referring to? Is it treaty law or is it international customary law which supersedes our Acts of Parliament? Is His Lordship unaware of all that body of international law that has come up since World War II and the establishment of the Bretton Woods Institutions under which international organizations are granted immunity by treaty to do business. As the counsel who appeared before the court and argued the appeal, I know that the attention of the court was drawn to this body of international law governing the operation of international organizations under which states have conferred immunity to such international organizations to enable them to carry out trade and other private activity. It cannot therefore be that the judge was ignorant of this position, when he was deciding that granting immunity is a violation of international law. I submit that this proposition was wholly erroneous and singularly ill-considered. His Lordship then goes on to state: ‘I know of no country which would allow a Bank to provide Banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers.’”³⁹

According to Muthoga, ignorance provides no defence. The fact that a judge does not know of any set of facts does not preclude a matter from being true. Muthoga asserts that ‘His Lordship was informed, by the writer (*i.e.* Muthoga), in the course of arguing the appeal of the many countries which allow PTA Bank and other Banks such as the East Africa Development Bank (ESDB) to operate with immunity.’ And Muthoga insists that,

“This immunity is necessary because the Bank, being an institution owned by sovereign states, would be unduly hampered in its operations if it was to consider the law of each country in which it does business every time it wishes to enter into a transaction. His Lordship trivialized the issue when he referred to ‘its hapless customers’ The PTA Bank is not a commercial Bank operating current accounts with cheque books. The PTA Bank is a Development Bank dealing with Trade lending in millions of US Dollars to anything but ‘hapless customers.’ The customer here, Tononolea Steels Limited was financing an importation contract in the order of eighty (80) Million US Dollars. Is this a ‘hapless customer?’ The cases that His Lordship refers to in support of the rule of International Law are clearly inapplicable. They relate to sovereign immunity. This has no application in this case. The PTA Bank did not and could not assert diplomatic or sovereign immunity. It asserted statutory immunity conferred pursuant to a Treaty.”⁴⁰

³⁹ See *Ibid.*

⁴⁰ See generally *Ibid.*

In summing up, Muthoga stresses strongly that His Lordship then makes his most astounding observation when he says: 'It is inconceivable that the Government of Kenya could knowingly disregard such an important rule of Intentional Law and grant PTA Bank absolute immunity from every form of legal process extending to even its commercial activities, I am en-titled to assume that the Minister did not intend to break the law and that he issued the Legal Notice in complete ignorance of the law and without the benefit of competent legal advise.'⁴¹ Muthoga concludes, respectfully, that,

"...His Lordship has got himself carried away here. As I have stated above, this grant of immunity is pursuant to treaty obligations and the Charter of the Bank. It is inconceivable that the Government of Kenya, and indeed the government of all other member states of the Bank, would have signed the Treaty and the Charter with their eyes closed. One must surely find fault in the assertion that the Minister, issued the Legal Notice 'in complete ignorance of the law and with-out the benefit of competent legal advise.' There was no material basis before their Lordships to enable them to conclude that the Minister did not have the benefit of competent legal advise. It is unlikely in any event that ministers in thirteen (13) countries that are members of Bank all acted in ignorance of international law that his Lords referred to. In preparing his judgment, His Lordship completely ignored treaty obligations that Kenya had assumed and preferred to give effect to some unwritten rule of international. Law and some unspecific public policy dictators. He did without seeking to hear the Minister. His Lordship then came to make the principal error of his judgment when he said: 'in my judgment, even if PTA Bank is an international organisation entitled to immunities and privileges including immunity from suits and legal process, it is not immune from suit in respect of the subject matter of this case.' Again, with respect, one cannot see how His Lordship can say in one breath that PTA Bank is entitled immunities and privileges including immunity from suits and legal process and then continue to say that is not immune from suit in respect of the subject matter of this case. That is clearly contradictory. It is illogical. Either, PTA Bank enjoys absolute immunity including immunity from suit and legal process or it does not. It cannot be that it enjoys absolute immunity in all other circumstances except those of present suit. The judge is clearly unable to distinguish between sovereign immunity (which a sovereign enjoys in the territory of another sovereign) and Treaty or Legislative immunity which an entity enjoys by virtue of legislation and Treaty. Banks are in the business of undertaking commercial activity. That is the only activity for which immunity could have been intended. His Lordship forgot that it is not the province of the judge to make the law. That is the province of Parliament Judges declare what the law is not and what it should be. All judges can do, and they often do, is lament that Parliament has not seen it fit to legislate in this or dud way or such a legislation is clearly undesirable. -In determining the rights of Steels Limited and PTA Bank, His Lordship was bound by the traditions of his office to state only what the law is. The other matters dealt with in his Lordship's judgment, are not of great importance and I chose not to deal them."⁴²

⁴¹ See Ibid.

⁴² See generally Ibid.

In the *PTA Bank v. Martin Ogang* case, the COMESA Court noted that while the original Charter of the PTA Bank could have been amended to create a favourable position for the PTA Bank in cases where a threat of litigation arose, there were serious obstacles to overcome before the validity of such an amendment could be accepted. The submission by counsel for the PTA Bank, that ‘the PTA Bank was not an organ of COMESA and as such was not answerable to the laws and regulations of the Common Market, because it has a Charter of its own which regulates its activities and relationship with its employees’, was struck down. But, the COMESA court did not give much thoughtful consideration to norms of customary international law which accord immunity to all public international organisations, at least for their non-commercial activities. Following below is the full text of the COMESA court holding in *PTA Bank v. Martin Ogang*.⁴³

1.5 The judgement in *PTA Bank and Dr Michael Gondwe v. Martin Ogang*

On January 20, 2000, the Respondent filed in the Registry of the COMESA Court of Justice, under Rule 75 of the Rules of the COMESA Court (hereinafter referred to as the ‘Rules’), an application for a Suspension Order (Reference Number 1A/2000).⁴⁴ By that application, the Respondent prayed the COMESA Court for an order suspending the operation of Resolution Number 58/99/01 dated December 6, 1999, passed by the Board of Directors of the First Applicant at its 58th meeting, pending the hearing and final determination of Reference Number 1B/2000, filed contemporaneously with the Respondent’s application for a Suspension Order.⁴⁵ For the sake of convenience and clarity, both Applicants will be referred to as ‘PTA Bank’, and the Respondent as ‘Martin Ogang’.

In the instant application, PTA Bank raised two preliminary objections to Reference Numbers 1A/2000, 1B/2000 and 1C/2000, filed by Martin Ogang.⁴⁶ Firstly, it was contended by PTA Bank that the failure by Martin Ogang to state the law or statute ‘upon which its standing before this Court is established’ deprives him of a *locus standi*, and disentitles him from any of the remedies he seeks. Secondly, it was contended that the COMESA Court of Justice lacks jurisdiction to entertain the said References or try the issues therein raised as Martin Ogang had not pleaded the law or statute upon which the Court’s jurisdiction was founded. The COMESA Court decided to deal with the jurisdictional issue first, as the resolution of it was expected to unravel the question of Martin Ogang’s *locus standi* in the matter. The application was vehemently opposed by Martin Ogang.

The PTA Bank’s argument was that, by its Charter, which was concluded on July 12, 1985, it was accorded certain privileges and immunities in territories of PTA Member States, from legal proceedings. Article 42 upon which great reliance was placed in support of this contention, as quoted by Martin Ogang at page 38 of Reference Number 1B/2000 provided as follows:

⁴³ Available on the web-site of Lawafrica.com at:

<<<http://www.lawafrica.com/services/go1.asp?file=../comesa.xml>>>, visited on December 21, 2005.

⁴⁴ See generally Ibid.

⁴⁵ See generally Ibid.

⁴⁶ See generally Ibid.

“1. Actions may be brought against the Bank in the territories of the Member States or elsewhere in a Court of competent jurisdiction.

2. No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank.”⁴⁷

Paragraph 2 applied to Members of the Bank who were all States, or financial institutions, as no individual was a member of the Bank. As cited by the PTA Bank, at page 4 in Reference Number 1D/2000, Article 42 in the relevant part, stipulates that:

“1. Subject to paragraphs 3 and 4 below, the Bank shall enjoy immunity from every form of legal process except in cases arising out of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of the member State in which the Bank has its principal office, or in the territory of a Member State or non-Member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.

2. No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank.”⁴⁸

The COMESA Court observed that for purposes of the judgment, it accepted that the original Charter may have been amended to create the scenario, which the PTA Bank presents – one favourable to the PTA Bank, but not so favourable to Martin Ogang.⁴⁹ The Court observed further that there were, however, serious obstacles to overcome before the validity of such an amendment could be accepted.⁵⁰

Counsel for the PTA Bank contended that the PTA Bank was not an organ of COMESA and as such was not answerable to the laws and Regulations of the Common Market, because it has a Charter of its own which regulates its activities and relationship with its employees.⁵¹ But, the Court observed that this fallacious assertion does not take cognisance of the following facts:

“The PTA Bank was established under Article 2 of its Charter pursuant to Chapter 9 of the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African

⁴⁷ See Ibid.

⁴⁸ See Ibid.

⁴⁹ See Ibid.

⁵⁰ See Ibid.

⁵¹ See Ibid.

States, which came into force on 2nd September 1982 (see Legal Counsel's Note at page 49 of the Charter). The first Charter of the PTA Bank was concluded at Bujumbura, Republic of Burundi, on 12th July 1985. Article 174 of the Treaty establishing COMESA, in paragraph 2 thereof, names the PTA Bank as one of its institutions continuing in force. In the original Charter of the PTA Bank, which was exhibited in Reference No. 1B/2000 by Martin Ogang Article 42 paragraph I stipulates, as above indicated, 'That actions may be brought against the Bank in the territories of the Member States or elsewhere in a court of competent jurisdiction. Amendments to the said Charter were subsequently made by the Board of Governors. The first of such amendments being made in 1990. Counsel further contended that by an amendment to its Charter in respect of Article 42, the PTA Bank now enjoys immunity from every form of legal process. Inviting, as that argument may seem, we are not persuaded by it. In the first place, the fountain and origin of the powers, privileges and immunities of all organs and institutions of COMESA is the Treaty itself. By paragraphs 4 and 5 of Article 174, the privileges and immunities of the PTA Bank were fossilised as at December 1984. At that date its privileges and immunities were restricted to process in the Courts of Member States only, and could not extend to this Court. In the second place, the Treaty does not provide for the existence of a rogue organ or institution flouting with impunity, all the rules of the organisation from which it derives birth. Thirdly, any privileges and immunities that the PTA Bank, by an amendment of its Charter, assumed after 1984 are ultra vires the Treaty that breathed life into the Bank. How can subsidiary legislation have pre-eminence over the parent constitution when it is in conflict with that constitution? If indeed, the PTA Bank's Charter was amended by the Board of Governors in respect of Article 42 paragraph 1, to confer upon the Bank 'immunity from every form of legal process' then that amendment was ultra vires Article 174 of the Treaty, which has not been amended."⁵²

The COMESA Court of Justice observed further that:

"It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states. The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its member states by the member states themselves. Article 42 of the Charter of the PTA Bank is only intended to describe the type of privileges and immunities that are to be conferred upon the PTA Bank and Article 43 then goes on to provide that these privileges and immunities shall be conferred not by the Bank upon itself, but by those who can do so, namely, the member states. In Kenya, for instance, it is the Privileges and Immunities (Eastern and Southern African Trade Development Bank) Order, 1991, that conferred privileges and immunities on the PTA Bank and certainly not Article 42 of the Charter of the PTA Bank or any amendments made to it by the Board of Governors of the PTA Bank. That the Board of Governors of the PTA Bank has itself, the right to confer privileges and immunities on the Bank, which has the force of law in the Member States, is, therefore, a fallacy. The amended Article of the Charter of the PTA Bank purporting to confer privileges and immunities upon itself, confers no privileges and immunities that have the force of law within COMESA. They can only be given

⁵² See Ibid.

the force of law in the COMESA Member States if the Member States themselves provide for it in their national laws.”⁵³

According to the COMESA Court, paragraph 6 of Article 174 of the COMESA Treaty, for the avoidance of doubt, declares that:

“6. Any references in the agreements referred to in paragraph 5 of this Article to the Preferential Trade Area or any officer or authority thereof shall have the effect as if references therein were substituted by the Common Market and the corresponding officer or authority thereof.”

And that the said paragraph 6 of Article 174 of the COMESA Treaty emphasises the continuance of the PTA Bank as an Institution of COMESA, though autonomous.⁵⁴ But, then, the PTA Bank does not exist in the air. It is composed of its Governors, officers and employees. Article 43 paragraphs 3 and 4 of the Bank’s Charter recite that:-

“3. The Bank, its property and assets shall enjoy immunity from all legal process except in so far as in any particular case it has, through the President, expressly waived its immunity: provided however that no waiver of immunity shall extend to any measure of execution.

4. The principal as well as regional offices of the Bank shall be inviolable. The property and assets of the Bank shall be immune from search, requisition, expropriation, and any other form of interference, whether by legislative, executive, judicial or administrative action.”

The COMESA Court points out that it bodes well to remember that when these privileges and immunities were conferred on the PTA Bank, the only courts in existence were the national Courts of the Member States comprising COMESA and the Tribunal established under Article 10 of the PTA Treaty of 1982.⁵⁵ According to the COMESA Court, although a Court of Justice had been decreed to be one of the principal organs of COMESA (Article 7 of the Treaty Establishing COMESA) it was still nascent.⁵⁶ However, the jurisdiction of the COMESA Court derives not from the Rules of the COMESA Court, as the PTA Bank erroneously assumed,⁵⁷ but from the COMESA Treaty itself. Article 7 paragraph 1 reads:

“1. There shall be established as organs of the Common Market:

- (a) the Authority;
- (b) the Council;
- (c) the Court of Justice;
- (d) Etc.”

⁵³ See Ibid.

⁵⁴ See Ibid.

⁵⁵ See Ibid.

⁵⁶ See Ibid.

⁵⁷ See Ibid.

And paragraph 4 of Article 7 of the COMESA Treaty, which recites that:

“The organs of the Common Market shall perform their functions and act within the limits of the powers conferred upon them by or under this ‘Treaty,’ would be superfluous if neither the national courts nor this Court had jurisdiction over the organs of the Common Market. Article 19 of the COMESA Treaty, which provides for the establishment of this Court emphasises that ‘the Court of Justice established under Article 7 of the Treaty shall ensure the adherence to law in the interpretation and application of this Treaty.’”

The COMESA Court then posed the following question. Who is likely to flout the adherence to law in the interpretation and application of the COMESA Treaty except its Member States, organs, and institutions, inclusive of the PTA Bank, and their employees?⁵⁸ Attempting to put the issue beyond doubt, the COMESA Court recited Article 27 of the COMESA Treaty, entitled: ‘Jurisdiction Over Claims by Common Market Employees and Third Parties Against Common Market or its Institutions’ (which treaty provision encapsulates the intendment of the framers of the Treaty):⁵⁹

- “1. The Court shall have jurisdiction to hear disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market (emphasis added).
2. The Court shall have jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties...”

The above treaty provisions vest in the COMESA Court jurisdiction not only to determine claims by employees of institutions of COMESA against their employers, but also jurisdiction over claims by any person against COMESA or an institution or employee thereof in the performance of any act within the scope of their employment.⁶⁰ The COMESA Court observed, thus, it is not susceptible of doubt that the PTA Bank is an institution of COMESA, as illustrated above.⁶¹ And that being an institution of the COMESA Treaty, the PTA Bank is, according to the COMESA Court, not exempt from the jurisdiction of the COMESA Court. Its Charter, the COMESA Court observes, is subservient to the Treaty which endowed the COMESA Court with jurisdiction over all organs and institutions of COMESA, inclusive of their employees.⁶² The court noted that far from Articles 29 and 30 of the COMESA Treaty, which conferred limited jurisdiction on national courts in disputes to which COMESA was a party, being derogations from the powers of the COMESA Court, they underscored the fact that decisions of the COMESA Court take precedence over decisions of national courts in the interpretation of the

⁵⁸ See *Ibid.*

⁵⁹ See *Ibid.*

⁶⁰ See *Ibid.*

⁶¹ See *Ibid.*

⁶² See *Ibid.*

provisions of the COMESA Treaty. The COMESA Court cited the English case of *Customs and Excise Commissioners v. APS Samex* (Hanil Synthetic Fibre Industry Co. Ltd, third party) [1983]1 All E.R. 1042, as an illustration of the application of such treaty provisions.⁶³ According to the COMESA Court, the reasons for granting immunity from judicial process in national courts of Member States of international organisations were succinctly stated in *Broadbent v. Organization of American States* 202 U.S. App. DC 27, 628F. 2d 27 (D.C. Cir. 1980) at 34-35, thus: ‘The United States has accepted without qualification the principles that international organisations must be free to perform their functions and that no member state may take action to hinder the organisation. The unique nature of the international civil service is relevant. International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics... An attempt by the court of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organisations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively.’

The COMESA Court ruled further that:

‘It is precisely to obviate injustice to an international civil servant in such circumstances or happenstance that most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances. The World Bank has established an administrative tribunal to resolve employees’ claims based on employment contract disputes. Article 179 of the E.E.C. Treaty and Article 152 of the Eurotom Treaty provide that the Court of Justice is to have jurisdiction in *any dispute between the Community and its servants* within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. (See Halsbury’s Laws of England, Fourth Edition para. 2.97 for ‘persons covered’). In similar vein, Article 27 of the Treaty of the Common Market (supra) confers jurisdiction on this Court to ‘hear disputes between the Common Market and its employees that arise out of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market.’ At first blush, it appears as if the provisions of paragraphs 4 and 5 of Article 174 which provide in relevant part as follows:

- ‘4. The rights and obligations arising from certain agreements concluded under the provisions of the PTA Treaty shall not be affected by the provisions of this Treaty.
5. For the purposes of paragraph 4 of this Article, the agreements referred to in that paragraph are:-

⁶³ See Ibid.

(a) the Agreement on Privileges and Immunities adopted by the PTA Member States in December, 1984;’

deprive this Court of jurisdiction to entertain judicial proceedings in cases in which the PTA Bank is a party. But a careful perusal of Article 43 of the Bank’s Charter discloses that the Bank’s immunity from legal process is limited to national courts of Member States. Paragraph 1 of Article 43 of the PTA Bank’s Charter reads:

‘To enable the Bank to achieve its objectives and perform the functions with which it is entrusted, the status, capacity, privileges, immunities and exemptions set out in paragraphs 3 to 10 of this Article shall be accorded with respect to the Bank in the territory of each Member State.’⁶⁴

In its ruling, the COMESA Court held that paragraphs 3 and 4 of the Article upon which the PTA Bank relies for immunity from process are, therefore, restricted in operation to the jurisdiction of national courts of Member States and have no application to the jurisdiction conferred on the international Court of COMESA by Articles 19, 23, 24, 25, 26, 27, 29, 30 and 32 of the COMESA Treaty.⁶⁵ Article 27 of the COMESA Treaty is entitled, ‘Jurisdiction over Claims by Common Market Employees and Third parties Against the Common Market or its institutions.’ With this, the COMESA Court was satisfied that the title of Article 27 was indicative of the intention of the framers of the COMESA Treaty to provide a forum to both employees of the organs of COMESA, including the COMESA Secretariat and employees of the institutions of COMESA, including the PTA Bank, in disputes that arise out of the application and interpretation of the Staff Rules and Regulations of the COMESA Secretariat, or in respect of the terms and conditions of employment of the employees of the institutions of COMESA.⁶⁶ According to the COMESA Court, COMESA, not unlike a national government is comprised of several organs and institutions.⁶⁷ As in government, public office means employment in the Civil Service or in any other public sector capacity. Similarly those who work at the institutions of COMESA, the COMESA Court observes, whether employed at the COMESA Secretariat or by an organ or institution of COMESA, are also employees of COMESA.⁶⁸ And the COMESA Court continued in its ruling that such individuals are international public officers in the COMESA Civil Service.⁶⁹ A ruling was therefore reached that the acts and decisions of all these organs and institutions, although they may be autonomous, are subject to challenge in the COMESA Court, which according to Article 19 of the COMESA Treaty, is to ensure the adherence to law in the interpretation and application of the COMESA Treaty.⁷⁰ The COMESA Court further pronounced that it was for these officers, who may not have recourse to national

⁶⁴ See Ibid.

⁶⁵ See Ibid.

⁶⁶ See Ibid.

⁶⁷ See Ibid.

⁶⁸ See Ibid.

⁶⁹ See Ibid.

⁷⁰ See Ibid.

courts, because of the immunity from process that their employers enjoy, for whom Article 27 of the COMESA Treaty offered an avenue for redress.⁷¹ And that to interpret Article 27 in such a way as to deprive them of access to the COMESA Court could not achieve the effect of striking down the mischief which the framers of the COMESA Treaty were desirous of obviating.⁷² In summing up the COMESA Court made the following remarks:

“Finally, it was contended that Martin Ogang held the post of President of the PTA Bank because he was a director of the Bank and, therefore, not an employee of the Bank as perceived under Article 27 of the Treaty. It is true that, generally speaking, directors are agents of their company. But directors may have a contract of employment with the company, such as service directors and managing directors. It is clear to us that remuneration of directors for their service, may be due either under a contract of employment, in which case if the contract is wrongfully terminated a cause of action will lie at the Director’s instance; or determined by the general meeting in which case no action lies for termination of the office. But Martin Ogang, as Chief Executive of the PTA Bank, was not a director but acted in pursuance of the directions of the Board of Directors (see Article 30 of the Charter). As such, he was in the service of the PTA Bank and has a right to a cause of action if his contract is wrongfully terminated. From the provisions of Article 27 (supra) it is evident that the Treaty, in granting this Court jurisdiction to determine claims by any person against the Common Market or its Institutions afforded Martin Ogang a right of action against the PTA Bank.”⁷³

And the COMESA Court continued:

“As to the *locus standi* of Martin Ogang, there are no Rules of the Court of Justice of the Common Market for Eastern and Southern Africa that have been breached, so as to deny Martin Ogang *locus standi* in this matter. He alleges the Bank breached the rules of natural justice and he has thereby suffered damage. Whether he can prove what he alleges is another matter altogether. This application was supposed to have been heard on 22nd March. On that day counsel for the PTA Bank applied for a deferment of the application on the ground that leading counsel was somewhere in the Middle East and would only be available after 11a.m. on 23rd March, 2001. The Notice stipulating the date and time of hearing of this application was served on the legal representatives of the parties as early as 23rd January, 2001. This Court has a very tight schedule arising from the fact that it is composed of Judges from different countries, and we consider the omission of leading counsel to appear on the scheduled date to argue the application, and the refusal of his juniors to move the Court in terms of the application, a slight on this Court. It is for counsel to wait on the Court and not the Court to wait on counsel. Such a situation is unacceptable and one for which the party asking for deferment must be mulcted in costs. Accordingly, the PTA Bank is ordered to bear the wasted costs of the abortive hearing on 22nd

⁷¹ See Ibid.

⁷² See Ibid.

⁷³ See Ibid.

March, 2001. The Court is satisfied that the application on both issues is misconceived, and is without merit and the same is accordingly dismissed with costs.”⁷⁴

1.6 A critical analysis of the judgement

What are some of the problems associated with the ruling in *Eastern and Southern African Trade and Development Bank (PTA Bank) and Dr Michael Gondwe v. Martin Ogang*? Let us take a more reasoned look. The COMESA court held in the first place that:

“...the fountain and origin of the powers, privileges and immunities of all organs and institutions of COMESA is the Treaty itself. By paragraphs 4 and 5 of Article 174, the privileges and immunities of the PTA Bank were fossilised as at December 1984. At that date its privileges and immunities were restricted to process in the Courts of Member States only, and could not extend to this Court. In the second place, the Treaty does not provide for the existence of a rogue organ or institution flouting with impunity, all the rules of the organisation from which it derives birth. Thirdly, any privileges and immunities that the PTA Bank, by an amendment of its Charter, assumed after 1984 are *ultra vires* the Treaty that breathed life into the Bank. How can subsidiary legislation have pre-eminence over the parent constitution when it is in conflict with that constitution? If indeed, the PTA Bank’s Charter was amended by the Board of Governors in respect of Article 42 paragraph 1, to confer upon the Bank ‘immunity from every form of legal process’ then that amendment was *ultra vires* Article 174 of the Treaty, which has not been amended.”⁷⁵

Persuading as their judgement may seem, the learned justices failed to articulate a well reasoned ruling in many respects. I am inclined to revisit some of the fundamentals behind their reasoning. First, what are the legal powers of the Board of Directors of PTA Bank under the PTA Bank Charter? This issue was not explored fully. Secondly, did the Board of Governors exceed its chartered powers when amending the Charter of the PTA Bank, or did it exceed powers of the parent treaty, the COMESA Treaty? Again, the court did not dwell into deeper waters. So, what did the court do? A positivist jurisprudential view that a legal norm subsisting at a lower echelon on the hierarchy of legal norms cannot override or supersede a norm placed at a higher level was postulated. But, should this view alone be the basis for the *ratio decidendi*? While the jurisprudential argument on the hierarchy of norms is convincing, it is not entirely clear if this view alone is good ground for treating the decision of the Board of Governors to amend the Charter as *ultra vires*. What exactly did the COMESA court mean by saying the decision of the Board was *ultra vires*? Did the court take time to look at the chartered powers of the Boards of Governors and Directors under the PTA Bank Charter, or was it enough that the amendment to the PTA Bank Charter ran contrary to the intendment of the COMESA Treaty and that, therefore, whatever powers could have been provided to the Board of Directors under the PTA Charter were *ultra*

⁷⁴ See Ibid.

⁷⁵ See above.

vires? An *obiter dictum* here would have helped to amplify and clarify matters. The COMESA court went on to observe as follows:

“It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states.”

While this view is partially correct, the court did not take cognisance of the fact that under public international law States can also enter into binding international relationships through their representatives.⁷⁶ Some States permit ambassadors or foreign affairs ministers to sign treaty obligations.⁷⁷ By parity of reasoning, if a body such as the Board of Governors of the PTA Bank comprises individuals that are representatives of Member States of the PTA Bank, the question arises then: do these individuals, be it under treaty law or customary international law, have powers to commit their respective States to binding international obligations? The COMESA court did not address this issue. Instead, a superficially all-assuming view was held, postulating that the Board of Governors had no powers to contract on behalf of Member States of the PTA Bank. The court ruled:

“The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its member states by the member states themselves.”⁷⁸

But, there are some States that do not need to enact specific pieces of legislation under municipal law in order to adopt treaty obligations. International law applies to them immediately. By virtue of being signatories or ratifying parties to a treaty or charter, such States would have the relevant international law obligations apply to them without even undertaking extra domestic action. The COMESA court, however, adds:

“Article 42 of the Charter of the PTA Bank is only intended to describe the type of privileges and immunities that are to be conferred upon the PTA Bank and Article 43 then goes on to provide that these privileges and immunities shall be conferred not by the Bank upon itself, but by those who can do so, namely, the member states.”⁷⁹

But, how do we know if members of the Board of Governors of the PTA Bank are not, by implication and proxy, mandated by Member States of the PTA Bank to grant such immunities to the PTA Bank?

“In Kenya, for instance, it is the Privileges and Immunities (Eastern and Southern African Trade Development Bank) Order, 1991, that conferred privileges and immunities on the PTA Bank and

⁷⁶ See I. Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1990), 4th Edition, pp. 606-607. See also M.N. Shaw, *International Law*, (Cambridge: Cambridge University Press, 1997), 4th Edition, pp. 636-641.

⁷⁷ See I Brownlie, *Principles of Public International Law*, *Ibid.*, pp. 606-607.

⁷⁸ See above for the full text of the judgement in *PTA Bank v. Martin Ogang*.

⁷⁹ See generally *Ibid.*

certainly not Article 42 of the Charter of the PTA Bank or any amendments made to it by the Board of Governors of the PTA Bank. That the Board of Governors of the PTA Bank has itself, the right to confer privileges and immunities on the Bank, which has the force of law in the Member States, is, therefore, a fallacy. The amended Article of the Charter of the PTA Bank purporting to confer privileges and immunities upon itself, confers no privileges and immunities that have the force of law within COMESA. They can only be given the force of law in the COMESA Member States if the Member States themselves provide for it in their national laws.”

Again, this is not a thoughtful consideration. I have explained above that there are basically two major types of approaches in public international law relating to the applicability and opposability of international legal norms. Some States enact specific municipal laws in order to import legal obligations and rights – flowing from a particular treaty - into their domestic legal systems, while others do not have to enact any municipal law to make international legal norms applicable to them (and also within their territories).⁸⁰ Yet, both these categories of States remain bound under obligations of treaties they sign or ratify.⁸¹ The COMESA court should have recognised this important point of law, but it did not.

The COMESA court proceeded to pronounce as follows:

“At first blush, it appears as if the provisions of paragraphs 4 and 5 of Article 174 which provide in relevant part as follows:-

‘4. The rights and obligations arising from certain agreements concluded under the provisions of the PTA Treaty shall not be affected by the provisions of this Treaty.

5. For the purposes of paragraph 4 of this Article, the agreements referred to in that paragraph are:-

(a) the Agreement on Privileges and Immunities adopted by the PTA Member States in December, 1984;’

deprive this Court (*i.e.* the COMESA court) of jurisdiction to entertain judicial proceedings in cases in which the PTA Bank is a party. But a careful perusal of Article 43 of the Bank’s Charter discloses that the Bank’s immunity from legal process is limited to national courts of Member States. Paragraph 1 of Article 43 of the PTA Bank’s Charter reads:

‘To enable the Bank to achieve its objectives and perform the functions with which it is entrusted, the status, capacity, privileges, immunities and exemptions set out in paragraphs 3 to 10 of this Article shall be accorded with respect to the Bank in the territory of each Member State.’

⁸⁰ See generally J.G. Starke, *An Introduction to International Law*, (London: Butterworths, 1977), 8th Edition.

⁸¹ See generally *Ibid.*

Paragraphs 3 and 4 of the Article upon which the PTA Bank relies for immunity from process are, therefore, restricted in operation to the jurisdiction of national courts of Member States and have no application to the jurisdiction conferred on the international Court of COMESA by Articles 19, 23, 24, 25, 26, 27, 29, 30 and 32 of the Treaty Establishing the Common Market for Eastern and Southern Africa.⁸²

But, then, where does the COMESA court sit when its hearing cases before it? Does the court not sit in 'the territory of one of the Member States of COMESA (*i.e.* one of the Member States of the successor to PTA)? If so, under the Charter provision stipulated above, does that not then preclude the COMESA court from exercising jurisdiction over the PTA Bank given that the COMESA court sits *in the territory of a Member State*? The acid test here is: can COMESA be subrogated to liabilities of the PTA Bank if the latter institution were to be in financial distress? Since the learned justices did pronounce that the PTA Bank is an organ of COMESA and that the COMESA court, therefore, has jurisdiction over the PTA Bank, can the same analogy be extended to matters of financial distress? That is, can COMESA take over debt obligations owed by the PTA Bank? Or, does the PTA Bank have a separate legal personality such that if we were to think of the PTA Bank's obligations as extending to COMESA we would be flouting the principle of separate legal personality? Does the fact that the PTA Bank is recognised in section 174 of the treaty establishing COMESA - as one of the institutions of COMESA - entail that the corporate veil of COMESA can now be pierced to make COMESA liable for the indebtedness of the PTA Bank? In the absence of any specific treaty provisions, or matters such as guarantees, fraud, co-mingled activities, or any other equities, what would subrogate COMESA to the indebtedness of the PTA Bank?

Further, can the PTA Bank create effective Fire walls or Chinese walls, respectively, to prevent contagion and protect the PTA Bank from having confidential information of its clients pour through to other units of COMESA? If such walls can be created effectively, does this, then, not mean that the same analogy - on the concept of a Chinese wall and Fire wall - can be extended to immunity enjoyed by the PTA Bank against the jurisdiction of the COMESA court? Is there no wall between the PTA Bank and the COMESA court? Under customary international law, international financial institutions, as public bodies pursuing international public purposes, are permitted to enjoy immunity from legal action before national and regional courts except where such immunity is explicitly waived. As noted above, this claim is based primarily on customary international law which accords immunity to all public international organisations, at least for their non-commercial activities.

It is not easy to appreciate the reasoning of the COMESA court when it says: 'Paragraphs 3 and 4 of the Article upon which the PTA Bank relies for immunity from process are, therefore, restricted in operation to the jurisdiction of national courts of Member States and have no application to the jurisdiction conferred on the international Court of COMESA.' Ideally, immunity, like indebtedness, is not far removed from the doings of the acknowledged legal

⁸² See above for the full text of the judgement in PTA Bank v. Martin Ogang.

person, and hardly extends to a parent-body or a third-party. We have also seen that the COMESA court sits *in the territory of a Member State*. But, then, not much thoughtful consideration was given by the COMESA court to the customary international law principle which accords immunity to all public international organisations, at least for their non-commercial activities.

1.7 Conclusion

This paper has examined the legal aspects of immunity of international organisations from legal action, drawing on lessons from COMESA. In this section, we conclude by reflecting on experiences of other international organisations. And we maintain that international financial institutions, as public bodies pursuing international public purposes (*e.g.* facilitating reconstructions and development in less developed countries, promoting international investment and trade, thus raising living standards and reducing poverty on a world-wide scale), should be permitted to enjoy immunity from legal action before national and regional courts except where such immunity is explicitly waived. Similar views were expressed by the late Dr Ibrahim Shihata, the former General Counsel and Senior Vice-President of the World Bank. In the words of Dr Shihata, regarding immunities enjoyed by the World Bank:

“Fears have been expressed that the Panel’s findings confirming the Bank’s non-observance of its own policies and procedures could expose it to the risk of suits before national courts initiated by or on behalf of affected parties. While in most cases liability, if it existed at all, would fall on the borrower whose actions or omissions on the ground would have caused the damage, there is a risk that the Bank may be sued for alleged damage resulting directly from its own failure. Such a risk may not materialise except in rare cases but it could be particularly real in litigious environments where resort to courts by activist groups is a normal practice. The Bank maintains however that as a public international organisation pursuing international public purposes (*e.g.* facilitating reconstructions and development in less developed countries, promoting international investment and trade, thus raising living standards and reducing poverty on a world-wide scale), the Bank enjoys immunity from legal action before national courts except where this immunity is explicitly waived. Such immunity is based on customary international law which accords immunity to all public international organisations, at least for their non-commercial activities.⁸³ The principle is codified in the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, subject only to the waiver of immunity by the agency concerned.”⁸⁴

⁸³ D.W. Bowett, *The Law of International Institutions* 349-50 (1982); Seyersted, *Jurisdiction over Organisations and Officials of States, the Holy Sea and Intergovernmental Organisations*, 14 *International and Comparative Law Quarterly* 493, 526 (1965); *Restatement of the Foreign Relations Law of the United States (Revised)* 467 *Comment & Reporters’ Note* 4 at 73 (Tentative Draft No. 4) (1983).

⁸⁴ 33 U.N.T.S. 261-302, Article 3, Section 4.

Dr. Shihata observed that the World Bank was a specialised agency of the UN,⁸⁵ and the waiver provided for in its Articles of Agreement was replaced in this context.⁸⁶ This waiver is an exception from the World Bank's general immunity as an international organisation pursuing a public purpose.⁸⁷ According to Dr. Shihata, the World Bank has asserted this immunity in the few cases in which it was sued before national courts, and that there has been no case in which a national court denied the World Bank's immunity when asserted.⁸⁸ Such immunity was confirmed in two cases before the US courts, the *Mendaro* case,⁸⁹ initiated against the World Bank by a former staff consultant, and the *Morgan* case,⁹⁰ initiated by a 'temporary employee' who worked for the World Bank under a contract between the World Bank and an employment agency. In both cases, the U.S. federal district court dismissed the suits on the basis of the World Bank's immunity.⁹¹ In the words of the *Mendaro* court,

“the facially broad waiver of immunity contained in the Bank's Articles of Agreement must be narrowly read in light of both national and international law governing the immunity of international organizations.”⁹²

Examining the issue of the World Bank's immunity further, Dr. Shihata noted that, later, in *Morgan*, where the claimant had no recourse to the World Bank's Administrative Tribunal because he was not a staff member, the U.S. court nevertheless upheld the World Bank's immunity. Dr. Shihata argued that the clear conclusion in both cases was that the waiver of such immunity provided for in the World Bank's Articles was limited to actions 'arising out of [the World Bank's] external commercial activities.'⁹³ The World Bank's Articles of Agreement provide for the immunity from legal process of the World Bank's Governors, Executive Directors, Alternates and staff with respect to acts performed by them in their official capacity, except when the World Bank waives this immunity.⁹⁴ They also contain a general provision which provides that the Bank may be sued in certain circumstances. It reads as follows:

“Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall,

⁸⁵ See Agreement between the UN and the IBRD approved by the Board of Governors on September 16, 1947 and between the UN and the IDA approved by the Board of Governors on February 24, 1961.

⁸⁶ I.F.I. Shihata, *The World Bank Inspection Panel*, (New York: Oxford University Press, 1994), pp. 106-110.

⁸⁷ *Ibid.*, pp. 106-110.

⁸⁸ See *Ibid.*, pp. 106-110.

⁸⁹ *Mendaro v. World Bank*, 717 F.2d 610 (1983). See also an earlier precedent, not involving the World Bank, in *Broadbent v. Organization of American States*, 628 F.2d (D.C. Cir., 1980).

⁹⁰ *Morgan v. International Bank for Reconstruction and Development*, 752 F. Supp. 492 (D.C.D.C. 1990)

⁹¹ I.F.I. Shihata, *The World Bank Inspection Panel*, op. cit., pp. 106-110.

⁹² *Mendaro*, supra (n.88), at 611.

⁹³ *Mendaro*, supra (n.88), at 620 (emphasis added). Compare *Lutcher S.A. Cellulose e Papel v. Inter-American Development Bank*, 382 F. 2nd 454 (D.C. Cir., 1967) where the Court of Appeals denied immunity of IDB and permitted a suit by a private borrower alleging IDB wrongfully lent money to plaintiff's competitors and failed to carry out alleged promises to make market study before participating in further loans to industry. The Court found that the complaint 'does not raise large or delicate international policy issues.' *Ibid.*, p. 460.

⁹⁴ See International Bank for Reconstruction and Development (IBRD) Articles of Agreement, at Article VII, Section 8(i), and International Development Association (IDA) Articles of Agreement, at Article VIII, Section 8.

however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.”⁹⁵

The proviso appearing immediately above, Dr. Shihata observed, was meant to enable the World Bank to borrow from financial markets by making it possible for its creditors to sue it before national courts.⁹⁶ Such borrowings are conducted as commercial transactions subject to national law and the disputes arising under them are subject to the jurisdiction of national courts.⁹⁷ Outside the area of borrowing and similar commercial activities, the World Bank, according to Dr. Shihata,⁹⁸ has consistently asserted immunity or accepted international arbitration (as for disputes arising under its loan and guarantee agreements).⁹⁹ In addition,

“The Bank has also successfully asserted immunity in cases brought by staff and former staff members before national courts and has only accepted to be sued by them before its Administrative Tribunal established in 1980.¹⁰⁰ The narrow interpretation of the waiver provided for in the above quoted Article VII, Section 3, was supported by the U.S. State Department Legal Adviser,¹⁰¹ and, as demonstrated above, by U.S. courts.”¹⁰²

⁹⁵ See IBRD Articles of Agreement, at Article VII, Section 3 and IDA Articles of Agreement, at Article VIII, Section 3.

⁹⁶ I.F.I. Shihata, *The World Bank Inspection Panel*, op. cit., pp. 106-110.

⁹⁷ *Ibid.*, pp. 106-110.

⁹⁸ *Ibid.*, pp. 106-110.

⁹⁹ See General Conditions Applicable to Bank Loans, at Article X, Section 10.04.

¹⁰⁰ See Resolution of the Board of Governors no. 350 dated April 30, 1980 establishing the World Bank Administrative Tribunal, effective July 1, 1980, with retroactive jurisdiction to January 1979.

¹⁰¹ Letter from Roberts B. Owen, U.S. Department of State Legal Advisor, to Leroy D. Clark, Equal Employment Opportunity Commission General Counsel (June 24, 1980). Commenting on Article VII, Section 3 of the IBRD Articles, the letter stated: “The language of the Article does not specify the exact scope of actions which may properly be brought against the bank under its provisions. However, at the time the Articles of Agreement were negotiated, Article VII(3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank’s issuance of securities, and to specify the venue for such actions, in order to facilitate the Bank’s access to capital markets. Cf. Restatement (Second), Foreign Relations Law of the United States, 84, Reporter’s Note at 275 (1965). It was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction or to expose the Bank’s internal personnel and administrative actions to review by our courts and administrative agencies.* (citation deleted.)”

¹⁰² I.F.I. Shihata, *The World Bank Inspection Panel*, op. cit., pp. 106-110.